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EXAMINER

GILBERT, WILLIAM V

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* JOSEPH D. RIPPOLONE

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Appeal 2009-015057  
Application 10/787,429  
Technology Center 3600

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Before JENNIFER D. BAHR, STEVEN D.A. McCARTHY and  
MICHAEL C. ASTORINO, *Administrative Patent Judges*.

ASTORINO, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellant appeals under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 2, 3, 5-10 and 12-16. More specifically, the Examiner rejects:

claims 2 and 12-16 under 35 U.S.C. § 102(b) as being anticipated by Bortugno (US 5,503,219, issued Apr. 2, 1996);

claims 3, 5 and 6 under 35 U.S.C. § 103(a) as being unpatentable over Bortugno;

claims 7 and 8 under § 103(a) as being unpatentable over Bortugno and Bernardi (US 3,431,972, issued Mar. 11, 1969); and

claims 9 and 10 under § 103(a) as being unpatentable over Bortugno, Bernardi and Hamjy (US 2,240,951, issued May 6, 1941).

Claims 7, 8 and 12 are independent claims. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We sustain the rejections of claims 2, 3, 5, 6 and 12-16. We do not sustain the rejections of claims 7-10.

Claim 7 is illustrative of the claims on appeal:

7. A gutter thawing system section comprising:

a first molded gutter section comprising a liquid passage and a first multiple of linear air flow passage adjacent thereto;

a second molded gutter section comprising a second multiple of non-linear air flow passages which connect at least two of said first multiple of linear air flow passages; and

a third molded gutter section comprising an input connector and a return connector, said input connector in communication with at least one of said first multiple of linear air flow passages, and a



*Second*, does Bortugno describe “wherein said air flow passage extends through said solid body and is spaced apart from said continuous upper surface and said continuous lower surface” as recited in claim 16? (App. Br. 5).

*Third*, do the evidence and technical reasoning underlying the rejection of claim 5 adequately support the conclusion that the subject matter of the claim would have been obvious? (App. Br. 6-7; Reply Br. 2).

*Fourth*, do the evidence and technical reasoning underlying the rejections of claims 7 and 8 adequately support the conclusion that the subject matter of those claims would have been obvious? (App. Br. 7-8; Reply Br. 2-3).

## FINDINGS OF FACTS

The record supports the following findings of fact (“FF”) by a preponderance of the evidence.

1. We adopt and incorporate by reference the Examiner's findings in the Answer at page 3, line 16 beginning with "Bortugno discloses" and ending at page 4, line 4 with "bottom wall 23."); and in the Answer at page 4, line 7 beginning with "[p]er the amendment" and ending at page 4, line 12 with "shown in the drawings are continuous."

2. We adopt the Examiner's findings in the Answer at page 5, lines 8-10, "the gutter wall includes a solid body extending between a continuous upper surface ("C" above, the lip portion) and a continuous lower surface ("D" above)."



1 continuous upper surface” as recited in claim 16. (App. Br. 5; *see also* App.  
2 Br. 6). The Appellant’s contention incorrectly characterizes the Examiner’s  
3 findings. The Examiner correctly finds Bortugno’s lip portion “C” of side  
4 wall 16 defines a continuous upper surface. (FF 2). The Examiner also  
5 correctly finds Bortugno’s lip portion “C” is spaced apart from the air flow  
6 passage “B”. (FF 3). Claim 15, from which claim 16 depends, does not  
7 prescribe the positions of the recited upper and lower surfaces relative to the  
8 structure of the side and bottom walls. In particular, the Appellant points to  
9 nothing in either the Specification or in ordinary usage which would  
10 preclude the Examiner from construing the term “upper continuous surface”  
11 broadly to include a surface at the uppermost tangent of the lip portion “C.”

12 *Third*, claim 5 recites “wherein said air flow passage comprises a  
13 multiple of non-linear air flow passages.” Bortugno does not disclose that  
14 the air flow passage within the manifold housing 22 is non-linear. (FF 4; *see*  
15 Ans. 6). The Examiner concludes it would have been obvious at the time the  
16 invention was made to a person having ordinary skill in the art as a matter of  
17 design choice for the air flow passage to be non-linear. (*See* App. Br. 6).  
18 The Examiner correctly reasons that a non-linear portion can “conform to  
19 the structure that the system is being attached.” (Ans. 11). The Appellant  
20 contends the Examiner has not provided an evidentiary basis to support his  
21 conclusion. (*See* Reply Br. 2). On the contrary, the Examiner’s conclusion  
22 of obviousness is persuasive because it is supported by articulated reasoning  
23 with rational underpinning.

24 *Fourth*, claims 7 and 8 both include recitations to a first, second, and  
25 third gutter section. Each gutter section is unique in that each one has  
26 different structural requirements as compared to the others. The Examiner

1 finds “Bortugno discloses a gutter thawing system (Fig. 5) having a gutter  
2 section with a liquid passage . . . and an air flow passage . . . and a hot air  
3 supply (12) . . . [but not] multiple of air flow passages or a multiple of gutter  
4 sections.” (Ans. 7). The Examiner relies on *In re Harza*, 274 F.2d 669  
5 (CCPA 1960) to provide reason why one of ordinary skill in the art would  
6 have modified Bortugno’s system to duplicate parts. (*Id.*). The Examiner  
7 does not analogize the facts in *Harza* to the facts in this appeal.

8         The Appellant contends the “reasoning for duplication of parts does  
9 not apply.” (App. Br. 7). In *Harza*, the court held that “[i]t is well settled  
10 that the *mere* duplication of parts has no patentable significance.” *Harza* ,  
11 274 F.2d at 671 (italics added). The Appellant points out that the three  
12 gutter sections recited in claims 7 and 8 “are different and not duplicates.”  
13 (*Id.*).

14         The Examiner does not merely duplicate Bortugno’s gutter section to  
15 make multiples of that gutter section. The Examiner changes the structure of  
16 duplicated gutter sections. Bortugno’s original section lacks a non-linear air  
17 flow passage, yet the Examiner modifies a second gutter section to include a  
18 non-linear air flow passage. (*See* Ans. 7-8). Then the Examiner must  
19 further modify the duplicated second section to connect a first air flow  
20 passage in Bortugno’s original section with the duplicated section’s non-  
21 linear air flow passage. The Examiner further modifies another duplicated  
22 section, a third section, in a different manner. The Examiner modifies the  
23 third section via Bernardi’s teaching to include a return connector. (*See*  
24 Ans. 8). This modification changes Bortugno’s system from a system  
25 without a return to hot-air type furnace 12 to a system with a return to the  
26 hot-air type furnace 12. The Examiner does not account for the modification



1 the return to the hot-air type furnace 12 has on Bortugno's exhaust ports 39.  
2 (See Reply Br. 2-3). These modifications are far beyond the holding in  
3 *Harza*, which is limited to a *mere* duplication of parts.

4 Additionally the Examiner also concludes, "[i]t would have been  
5 obvious at the time the invention was made to a person having ordinary skill  
6 in the art to use the system in Bernardi . . . with the air flow passage in  
7 Bortugno because the systems are functionally equivalent and would  
8 perform equally as well." (Ans. 8). The Examiner's conclusion of  
9 obviousness attributed to functional equivalence between the Bortugno  
10 system and Bernardi system does not account for the numerous  
11 modifications proposed by the Examiner. As such the reasoning articulated  
12 by the Examiner for claims 7 and 8 is not persuasive.

#### 14 CONCLUSIONS

15 *First*, Bortugno describes "a gutter wall having a continuous cross  
16 section separating the liquid passage and the air flow passage, wherein said  
17 gutter wall includes two spaced apart side walls and a bottom wall that  
18 define the liquid passage" as recited in claim 12. We sustain the rejection of  
19 claims 2 and 12-15 under § 102(b) as being anticipated by Bortugno. We  
20 also sustain the rejections of claims 3 and 6 under § 103(a) as being  
21 unpatentable over Bortugno.

22 *Second*, Bortugno describes "wherein said air flow passage extends  
23 through said solid body and is spaced apart from said continuous upper  
24 surface and said continuous lower surface" as recited in claim 16. We  
25 sustain the rejection of claim 16 under § 102(b) as being anticipated by  
26 Bortugno.

*Third*, the evidence and technical reasoning underlying the rejection of claim 5 adequately support the conclusion that the subject matter of the claim would have been obvious. We sustain the rejection of claim 5 under § 103(a) as being unpatentable over Bortugno.

*Fourth*, the evidence and technical reasoning underlying the rejections of claims 7 and 8 do not adequately support the conclusion that the subject matter of those claims would have been obvious. We do not sustain the rejection of claims 7 and 8 under § 103(a) as being as being unpatentable over Bortugno and Bernardi. We also do not sustain the rejection of claims 9 and 10 under § 103(a) as being unpatentable over Bortugno, Bernardi and Hamjy.

## DECISION

We AFFIRM the Examiner's decision rejecting claims 2, 3, 5, 6 and 12-16.

We REVERSE the Examiner's decision rejecting claims 7-10.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART

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